

STATE OF ARIZONA
CITIZENS CLEAN ELECTIONS COMMISSION

Re: MUR No. 04-0030

MODIFICATION OF PROBABLE CAUSE RECOMMENDATION

On August 12, 2005, notice was given to Jesse Hernandez ("Respondent") in reference to the Commission's investigation and reason to believe finding of May 26, 2005, that he violated A.A.C. R2-20-702(C), which prohibits a participating candidate from using funds in the candidate's campaign account to purchase fixed assets with a value in excess of \$600.00, and A.R.S. Sec. 16-913 and -941 and A.A.C. R2-20-109, which require candidates to comply with campaign finance reporting requirements. Pursuant to A.A.C. R2-20-214, the August 12 letter served as the brief setting forth my position on the factual and legal issues in the case and contained my recommendation. I now confirm that the Commission should find probable cause to believe that there has been a violation of the campaign finance reporting rules referenced; I will withdraw my recommendation that the Commission should find probable cause to believe there was a violation of the rule on purchases of fixed assets. As the civil penalty for the violations I will recommend that the Commission fix the amount at \$15,000.00 pursuant to A.R.S. Sec. 16-942 (B).

I have reviewed Respondent's August 17, 2005, response to the notice, and the campaign finance reports the committee placed on file in the Office of the Secretary of State in late August in response to the notice. My findings are as follows:

A. Use of Campaign Funds

The Commission's reasons to believe finding that the campaign expended \$925.00 on August 20, 2004, being \$325.00 in excess of the spending limit for a fixed asset, has been overcome. I note Respondent's denial that he bought a computer, and I further note that in the amended campaign finance report the expenditure is identified as being for the campaign web site. It appears to me that this item is now satisfactorily explained and reported, and I will recommend that the Commission dismiss this aspect of the complaint.

B. Reporting Requirements

The Report of Miller, Allen & Co. ("Auditors Report") found that for one of three deposits selected for testing the deposit amount was not recorded nor properly reflected in the candidate's records and campaign finance report for the review period. It found that for five of six disbursements selected for testing, the withdrawal amounts were not recorded nor properly reflected in the candidate's records and campaign finance report. The accountants in their review performed a proof of receipts and disbursements for the reporting period and determined that the Committee's "bank" activity did not agree to amounts reported on the campaign finance report. Other failures were noted, as well.

There have been repeated contacts between the Respondent and representatives of the Commission, which culminated in Respondent filing, in late August, 2005, his initial Pre-General Election, Post-General Election, and to-a-current-date campaign finance reports. The record-keeping deficiencies noted by the auditors made the reporting difficult, at best, and the reports themselves unreliable, at worst. The report now on file (Exhibit A attached) shows the campaign committee still has cash on hand of \$4,538.46, which should have been returned to the Commission long ago. However, last week, the Office of the Secretary of State sent by fax a report showing the campaign committee not only had no cash on hand but indeed had overspent its limit (and the Respondent's personal contribution limit) (Exhibit B attached). That report has apparently been withdrawn or corrected, and the information now on file shows cash on hand of \$4,538.46. (Exhibit C attached). I do not believe further investigation of this Matter is warranted as the violations of the Commission's record-keeping and finance reporting requirements could not be clearer. Accordingly, I confirm that I will recommend to the Commission that it find probable cause to believe that Respondent has violated rules made under the Act and impose a civil penalty as described below.

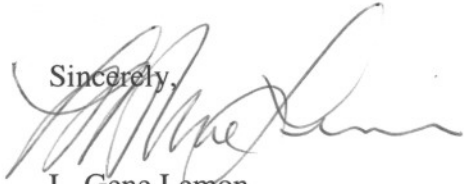
C. Civil Penalty

I recommend that the Commission make a finding that there is probable cause to believe that Respondent violated A.R.S. Sec. 16-941 and A.A.C. R2-20-109 (B)(3)(a) and (b), and issue an Order assessing a civil penalty in accordance with A.R.S. Sec. 16-942 (B). Pursuant thereto, the civil penalty for a violation of any reporting requirement imposed by the Act shall be \$110.00 per day the violation exists, and the penalty may not exceed twice the amount of expenditures or contributions not reported (placing a limit on the civil penalty here at \$43,973.34).

The Commission's rule on civil penalties, A.A.C. R2-20-222, fixes limits on civil penalties and suggests \$15,000.00 is appropriate for a knowing and willful violation. The Complaint in this Matter was filed with the Commission on October 20, 2004, and the Respondent was notified of it on October 26, 2004. The campaign committee has been audited by independent accountants engaged by the Commission last Spring. This investigation began in May. The campaign committee filed its reports until September 6, 2004, and then filed none until late August, 2005. With all the activity in this Matter, it is impossible to believe that the Respondent did not know reports were due, that those reports had not been filed, and that diligent but fruitless efforts were being made to correct things. The violations appear to be knowing and willful violations; therefore, my recommendation is for a total civil penalty of \$15,000.00 for the reporting violations, the candidate and the candidate's committee being jointly responsible therefore. In addition, Respondent should be ordered to return all unspent monies to the Fund.

Dated: September 8, 2005

Sincerely,

A handwritten signature in dark ink, appearing to read "L. Gene Lemon". The signature is fluid and cursive, with a large initial "L" and a long, sweeping underline.

L. Gene Lemon
External Investigative Consultant
Citizens Clean Elections Commission

Copy: Commissioners